

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Village of Tilton, Vermilion County, Illinois,	:	
Petitioner,	:	
	:	
v.	:	
	:	
Norfolk and Southern Railroad and State of Illinois, Department	:	T00-0103
of Transportation,	:	
Respondents.	:	
	:	
Petition for an Order regarding a separation of grades and	:	
construction of a bridge carrying 14 th Street (FAU 7010), Village	:	
of Tilton, Vermilion County, Illinois over the tracks of said Railway	:	
Company, apportioning cost thereof and directing an appropriate	:	
portion thereof to be borne by the Grade Crossing Protection	:	
Fund.	:	
	:	
	:	

DRAFT SUPPLEMENTAL ORDER

By the Commission:

On February 24, 2005, the Illinois Commerce Commission ("Commission") entered its Order in this matter that granted permission to the Village of Tilton ("Village"), Vermilion County, to proceed with the construction phase of the 14th Street highway overpass structure over the track of the Norfolk Southern Railway Company ("NS") and the reconstruction of the existing highway overpass structure carrying 14th Street over the track of the CSX Transportation, Inc., ("CSX") and other associated work to improve the approaches and roadways adjacent to the structures. The NS and CSX are also referred to as ("Railroads").

Prior to the issuance of the February 24, 2005 Order the Commission entered an Interim Order on December 5, 2001 approving the allocation of Grade Crossing Protection Fund ("Fund") monies in the amount of \$618,500, estimated to be 100 % of the ICC Eligible Phase I and Phase II Preliminary Engineering Costs ("Eligible PE"), with the expressed intent of the Commission to increase Fund participation to a level not to exceed 60 % of the total ICC eligible project costs.

Upon receiving notification as required by the Interim Order; the Commission scheduled a hearing to authorize the construction phase of the project. However, when the hearing was held on February 21, 2002 the discussion of the construction phase was put on hold to hear testimony regarding a potential problem with mine subsidence in the project area. The Village requested authority to conduct a study to evaluate the potential mine subsidence problem at an estimated cost of \$283,400. The Commission entered a Supplemental Interim Order on May 8, 2002 granting permission to conduct the study and approved allocating 100 % of the additional costs to the Fund, not to exceed \$283,400, subject to the previously established cap on Fund participation of 60

% of the total ICC eligible project costs.

Upon receiving notification as required by the Supplemental Interim Order; the Commission scheduled a hearing to review the information of the mine subsidence study, review modified construction plans and to consider the proposed division of costs for the project. The hearing was held at the Commission's Springfield office on October 8, 2003, continued to October 29, 2003 and again continued until December 10, 2003. The parties exchanged correspondence during this time to reach an agreement as to the division of costs for the project. The Department offered into evidence, Illinois Department of Transportation Exhibit 1, which summarized the changes to the proposed division of cost from the original estimate in September 1999 to the present. The Department's proposed division of cost, offered into evidence as Illinois Department of Transportation Exhibit 2, indicates the Department's participation in this project has increased from \$2,326,000 in September 1999 to \$2,648,450 in July 2000; and to \$5,658,680 in May 2002; and to \$6,054,300 in June 2006. On June 29, 2004, the Commission entered its second Supplemental Interim Order that required the Village to proceed with the construction phase of the project and allocated the remaining \$4,016,600 of the Commission's original project commitment of \$4,918,500 for the construction phase of the project. The Commission's percentage participation in eligible costs as originally proposed in 1999 was 54.3 % and the Department's share of eligible costs was 39.2%. A shortfall in funding of \$390,000 was identified in the original proposal and the Railroads were identified as a participant in the division of costs to offset this shortfall. The Commission's percentage participation in eligible costs as ordered by the Commission in 2005 was 48.5 % and the Department's share of eligible costs was 51.6%. The proposed division of costs is very similar to the original proposed division of costs on a percentage basis. The Commission's percentage participation in eligible costs is 53.66 % and the Department's share is 46.34 %. The increased participation by the Village of \$558,480 and a reduction in Non-ICC eligible costs of \$219,460 has also allowed the Department to shift approximately \$777,940 from the Non-ICC portion to participate in the ICC eligible portion of the project.

Upon receiving notification as required by the Second Supplemental Interim Order; the Commission scheduled a hearing to review the final construction plans and to consider the proposed division of costs for the project. The hearing was held at the Commission's Springfield office on October 27, 2004 and the matter was marked "Heard and Taken."

On April 14, 2006 the Village filed with the Commission an Amended Supplemental Petition in the above captioned matter. In the Amended Supplemental Petition, the Village seeks authorization from the Commission to approve an Amended Division of Costs ordered by the Commission on February 24, 2005, including an increase in the Commission's obligation from the Grade Crossing Protection Fund and other such relief as may be required to effectuate the Order. The Village was specifically ordered by the Commission to proceed immediately with the construction phase of the 14th Street project, substantially in the manner and location as set forth in the Village's Exhibit 15 admitted into evidence at the hearing held on October 27, 2004 and to complete the

work within thirty-six (36) months of the Order. In compliance with the Commission's Order, the Village took the project to letting and received only one bid, which exceeded the proposed construction budget by approximately \$2,000,000. The division of costs ordered by the Commission on February 24, 2005 was based on cost estimates prepared prior to the issuance of the Second Supplemental Order in June 2004. It was reasonable to expect that the bid would exceed the estimated project costs. Due to the shortfall of funding the Village was not able to award the contract and proceeded to explore avenues for increasing funding, reducing the scope of the project and reconfiguring the bid package to attract additional bidders. The Eligible PE costs incurred to date are \$1,322,200. The costs for the mine subsidence study were approved not to exceed \$283,400, however additional Eligible PE costs were incurred to incorporate changes required by the mine subsidence study and to prepare the project for a second letting. The Commission's Interim Order entered December 5, 2001 included the following statement in finding paragraph 4, "the cost of preliminary engineering, phase 1 and 2, should be allocated 100 % to the Grade Crossing Protection Fund ("Fund"); while the Fund is paying 100 % of the cost for the preliminary engineering, it will be averaged into the overall project cost and the total Fund contribution will not exceed 60 % of the eligible cost." The Village's Amended Supplemental Petition includes a request for an increased contribution from the Fund and this request shall be interpreted to include a request for the difference in the Eligible PE costs incurred between the issuance of the Interim Order entered December 5, 2001 and the Order entered on February 24, 2005 and for those Eligible PE costs incurred after the Order. The Commission had previously allocated \$618,500 for the Eligible PE costs. The total estimated Eligible PE cost in the February 24, 2005 Order was \$1,332,200. This total included the costs for the mine subsidence study which were approved not to exceed \$283,400. The Village's actual costs for the mine subsidence study did not exceed \$283,400; therefore for purposes of determining the additional Eligible PE costs to be allocated to the Fund, \$283,400 would need to be deducted from the total of \$1,332,200 for a revised Eligible PE cost of \$1,048,800. The difference between the \$618,500 previously allocated by the Commission and the actual Eligible PE cost is \$430,300. Approximately \$231,200 of Eligible PE costs were allocated to the Department from funds intended for the construction phase of the project in the February 24, 2005 Commission Order. An additional \$90,900 in Eligible PE costs were incurred after the Order was entered. The Commission should pay for 100 % of the increase in the Eligible PE cost in accordance with the terms of the December 5, 2001 Interim Order in the amounts of \$430,300 for costs prior to the Order and \$90,900 for cost incurred after the Order.

The Village initiated a second letting of the project and received a single bid on November 10, 2005. This bid was within 7.05 % of the engineer's revised estimate prior to letting and was determined to be an awardable bid under accepted industry practices for project letting. However, the estimated costs in November 2005 and the bid received exceeded the previously ordered budget and division of costs by \$3,587,573. In the Amended Supplemental Petition the Village proposed to fill the funding gap by increasing their contribution \$541,100, the contribution of NSRR by \$104,600, the CSX contribution by \$85,273 and to seek the remainder of \$2,856,600 from the Grade

Crossing Protection Fund. The Village's proposed division of costs would increase the contribution from the Grade Crossing Protection Fund to 60 % of the total ICC eligible costs.

Pursuant to due notice given in accordance with the law and rules and regulations of the Commission, the matter came on for hearing before a duly authorized Administrative Law Judge of the Commission on May 31, 2006 at the Commission's Springfield office. Present at the hearing was counsel for the Village, the NS, CSX and the Department. A representative of the Commission Rail Safety Section was also present and participated in the hearing. Counsel for the NS, CSX, the Village and the Department made arguments in regards to pending Motions to Dismiss filed by the NS and CSX. The parties requested that a ruling on the Motions be stayed temporarily to afford an opportunity to negotiate a resolution to the contested issues in this case. The Railroads objected to an increase in their participation in the funding of the project. The Department and Commission staff also expressed concerns regarding the increase in costs for the Non-ICC eligible portions of the project. These increases totaled approximately \$725,000 when compared to the original estimates in Exhibit A approved by the February 25, 2004 Order. The Department suggested that the Village consider reducing the scope of work for Non-ICC eligible portions of the project so that monies committed by the Department could be shifted to cover the shortfall in the funds available for the construction of the new highway overpass structure over the NS and reconstruction of the existing structure of the CSX. The Parties reached a compromise settlement and have agreed to revise the Division of Cost pending approval by the Commission of an increase in funding from the Grade Crossing Protection Fund. The details of the agreement are as follows: the Village has agreed to increase their participation by the amount of \$558,480; the Village has withdrawn their request for increased participation by the NS and CSX and the Railroads have confirmed their agreement to comply with the allocation of costs and lump sum payment in the February 2005 Commission Order; the Village has also agreed to reduce their request for additional funding from the Grade Crossing Protection Fund based upon a statement by the Commission staff that they would recommend and support a request by the Village to limit the proposed Fund contribution increase to 60 % of the increase in ICC eligible costs other than Eligible PE from the February 24, 2005 Order when compared to the revised estimated project cost submitted with the Amended Supplemental Petition. The revised estimated ICC eligible cost is based on an actual contract bid to perform the work and is a reasonable estimate. The amount of the increase of ICC eligible costs is determined by comparing the total ICC eligible project cost in Exhibit A of \$10,145,437 minus \$1,332,200 in Eligible PE which equals \$8,813,237 to the revised estimated ICC eligible cost of \$12,958,400 minus \$1,622,200 in Eligible PE which equals \$11,336,200. The difference in these costs is \$2,522,963 and 60 % of that amount is \$1,513,778. The increased cost of Eligible PE occurring after the February 24, 2005 Order to be allocated to the Fund is determined by calculating the difference between the revised Eligible PE estimate of \$1,622,200 and the amount originally allocated to the Fund of \$1,101,000 and which equals \$521,200 and then subtracting the \$430,300 in Eligible PE not allocated in the Order for a total of \$90,900.

The Fund's allocation of an additional \$430,300 for the increase in the Eligible PE costs incurred prior to the Order, plus \$90,900 for Eligible PE Costs incurred after the Order should be added to the increased allocation for the construction phase of the project of \$1,513,778 for a total allocation increase from the Fund of \$2,034,978. This increase is \$821,622 less than the Village's request in the Amended Supplemental Petition. The Commission's participation in the ICC eligible portion of the project under this division of costs will be approximately 53.66 %, which remains lower than the 60 % maximum authorized in the Interim Order. The Village's revised request has also been reduced to a level which is below the estimated cost increase for the Non-ICC eligible portion of the project. This request is fair and reasonable in that the Village is not asking the Fund to bear any of the burden of the increased costs for work which is not directly related to the structures. The remaining 46.34 % of ICC eligible costs will be funded by a reallocation of the Department's contribution toward Non-ICC eligible costs to the ICC eligible costs portion of the project and by transferring amounts previously allocated to fund the shortfall in preliminary engineering costs to construction. The Village has agreed to reduce the scope of the project pertaining to the Non-ICC eligible items before the Commission in order to allow for the reallocation of Department funds. The hearing was continued until June 14, 2006 at 10:00 am and continued again to July 26, 2006 at 10:00 am to allow the parties an opportunity to draft and review a proposed agreed division of costs.

Pursuant to due notice given in accordance with the law and rules and regulations of the Commission, the matter came on for hearing before a duly authorized Administrative Law Judge of the Commission on July 26, 2006 at the Commission's Springfield office. Present at the hearing was counsel for the Village, the NS, CSX and the Department. A representative of the Commission Rail Safety Section was also present and participated in the hearing. The Village submitted copies of the revised project plans as Petitioner's Exhibit D which do not include any substantial changes to the manner and location of the bridge structures previously approved by the Commission. Testimony was presented at the hearing regarding necessary changes to the approach work within the ICC eligible project limits required by the reduction in the scope of work to improve 14th Street in the Non-ICC eligible portion of the project as originally proposed. The additional work required within the ICC project limits, in addition to the upward economic pressures in construction costs since the budget was originally approved in February 2005, have contributed to the Village's need for additional construction funding. The Village also requested to withdraw Exhibit C as filed with the Amended Supplemental Petition and substitute a revised Exhibit C which incorporates all of the changes to the scope of work and the proposed division of costs agreed upon by the parties. No objections were made to the revised Exhibit C or Exhibit D and the Exhibits were admitted into evidence. The Department introduced into evidence Illinois Department of Transportation Exhibits 1, 2 and 3 without objection. The Railroads agreed to withdraw their Motions to Dismiss based upon the amended division of costs submitted in the revised Exhibit C. On that date the matter was marked "Heard and Taken".

The Commission, having given due consideration to the entire record herein, finds that:

- (1) The Commission has jurisdiction over the parties and the subject matter of this proceeding;
- (2) The recitals of fact set forth in the prefatory portion of this Supplemental Order are supported by the evidence and are adopted as findings of fact;
- (3) The Village of Tilton should be required to proceed with the construction of the 14th Street highway overpass structure over the track of the NS and the reconstruction of the existing highway overpass structure carrying 14th Street over the track of the CSX and other associated work, substantially as shown on Village's Exhibit D; an extension of time should be granted to allow the completion of the project within thirty-six (36) months from the date of this Supplemental Order;
- (4) In the event of a mine subsidence event that damages the NS structure, the Department has agreed to assist the Village in obtaining emergency funding from the General Assembly for repairs;
- (5) It is fair and reasonable to revise the division of costs for this project as set forth in the table attached and incorporated herein by reference as Amended Appendix A at the end of this Supplemental Order between the Secretary of the Illinois Department of Transportation through the Grade Crossing Protection Fund of the Motor Fuel Tax Law and its own funds, the Village of Tilton, the Norfolk Southern Railway Company, and CSX Transportation, Inc. and that they be directed to bear their respective portions of the actual cost of the proposed improvements as set forth in the table incorporated herein by reference and attached as Amended Appendix A at the end of this Supplemental Order; the total estimated ICC eligible project costs for this project are \$12,958,400 and the estimated total project cost is \$14,160,000; the amount already obligated from the Fund through previous Orders and this Supplemental Order shall not exceed \$6,953,500; the amount to be paid by the NS and CSX shall not exceed \$380,000 and \$124,700, respectively; (the NS and CSX payments will be lump sum payments); the Railroad's force account work, estimated to be a total of \$263,600 is 100 % reimbursable as a project expense and is separate and distinct from the Railroad's lump sum payments; the Village shall be allocated costs not to exceed \$647,500; and the Department shall contribute an amount not to exceed \$6,054,300; all cost of future maintenance of both highway overpass structures, highway approaches thereto, and associated roadway improvements, shall be borne by the Village (see Finding 4 for procedure in the event of a subsidence event); in the event the final amount of ICC eligible costs is less than estimated, the cost savings should be distributed to the parties in accordance with the percentage obligations listed in Appendix A attached hereto and incorporated herein by reference; if the amount of ICC eligible costs is more than the estimated cost, the Village shall file a Supplemental Petition with the Commission requesting that the final

increased cost be divided between the parties in the same percentages as listed in Appendix A.

- (6) An additional payment of \$521,200 from the Fund should be made available to the Village in FY 2006 for Eligible PE costs and an additional \$1,513,778 from the Fund should be made available in FY 2007 for construction. The total authorization for this project from the Fund shall not exceed \$6,953,500.
- (7) All other terms and conditions of the Interim Order, Supplemental Interim Order, Second Supplemental Interim Order, and Order should remain in full force and effect except as herein modified.

IT IS THEREFORE ORDERED that the Village of Tilton is hereby authorized and directed to commence construction of a new highway overpass structure carrying 14th Street over Norfolk Southern Railway Company's tracks and to reconstruct the highway overpass structure carrying 14th Street over the CSX Transportation, Inc.'s tracks in the Village of Tilton, Vermilion County, Illinois.

IT IS FURTHER ORDERED by the Commission that an additional expenditure of \$521,200 be obligated from the Fund in FY 2006 and made available to the Village to pay for actual Eligible PE costs incurred which are over and above previously estimated costs and are required to be made by the Commission to comply with it's own Interim Orders.

IT IS FURTHER ORDERED by the Commission that an extension is hereby granted to the Village within which to complete the work for a period of thirty-six (36) months from the date of this Supplemental Order as required by the original Interim Order, Supplemental Interim Order, Second Supplemental Interim Order and Order, dated December 5, 2001, May 8, 2002, June 29, 2004 and February 24, 2005, respectively.

IT IS FURTHER ORDERED by the Commission that except as modified herein, all other terms and conditions of the Interim Order, Supplemental Interim Order, Second Supplemental Interim Order, and Order dated December 5, 2001, May 8, 2002, June 29, 2004 and February 24, 2005, respectively, should remain in full force and effect except as herein modified.

IT IS FURTHER ORDERED that, subject to Section 18c-2201 and 18c-2206 of the Law, this is a final decision subject to the Administrative Review Law.

By Order of the Commission this ____ day of _____ 2006.

Chairman